DAVID A. ROSENFELD, Bar No. 058163
ALAN CROWLEY, Bar No. 203438
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net
acrowley@unioncounsel.net

Attorneys for Charging Party BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 28

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC, Charging Party And SHAMROCK FOODS COMPANY, Respondent.	No. 28-CA-150157 **CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

TABLE OF CONTENTS

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES

Federal Cases

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Federal Statutes

State Statutes

Other Authorities

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

I. INTRODUCTION

Charging Party joins in the Brief in Support of Cross-Exceptions to be filed by Counsel for the General Counsel. This Brief addresses issues specifically raised in the Cross-Exceptions filed by the Charging Party.

Preliminarily, we note the Administrative Law Judge ("ALJ) has found the employer's misconduct replete with violations of the Act. There was a consistent pattern of unlawful actions aimed at sabotaging the Union's organizing effort and terrorizing workers. Nonetheless, he has found that some activity was not unlawful even though it was clear that the conduct was part of the pattern of unlawful activity. To the extent that that particular conduct was not unlawful, he failed to consider the overall pattern of illegal conduct and its effect on other conduct.

The employer's conduct was nothing less than terrorizing employees in the workplace.

II. THE MID-FEBRUARY UNION MIS-EDUCATION MEETING

Phoenix Warehouse Manager Vaivao committed numerous violations of the Act. In mid-February, he conducted a Union meeting, which the Administrative Law Judge incorrectly called an "education meeting." It was, rather, a union interference or sabotage meeting. Nonetheless, Vaivao opened the floor to questions and told the employees he "wanted to know if there [were] any issues that we want to bring up." That was a plainly an open ended solicitation. He solicited complaints or grievances. It wasn't limited. In the context, it plainly was open-ended, and the Administrative Law Judge incorrectly found that this was not an unlawful solicitation of grievances or complaints. It was also a form of interrogation. He was seeking to learn the identity of employees who supported a union to solve workplace problems or to learn the identity of employees who were willing to speak up. If anyone had spoken up, they would have been subject to retaliation and threats that were found by the ALJ.

The Administrative Law Judge noted in footnote 13 that he discredited Mr. Vaivao's testimony, that is, he found that Mr. Vaivao was a liar. These were not education meetings, these were Union interference meetings. See ALJD p. 9:6-19. The Board should find Mr. Vaivao to be dishonest, a liar, a perjurer or other more descriptive term. This mealy-mouthed word of "discredit" should be discarded. It is a word that makes the 1% proud. Workers use other terms.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

III. THE EMPLOYER UNLAWFULLY CREATED THE IMPRESSION OF SURVEILLANCE.

The ALJ found that Mr. Vaivao did not create the impression when he told the employees that he had information about Union activities from some employees. See ALJD p. 10:4-20.

First, the ALJ has already discredited Mr. Vaivao as a repeat liar. There is no support for Mr. Vaivao's claim that he got this information from other employees. He did get it from a manager, and that is enough to establish that it didn't come wholly from other employees who voluntarily stepped forward. In any case, given the course of nature, anything that was said to management could not be considered voluntary. The statement should be found to be unlawful surveillance. See ALJD p. 10:4-20.

Second, the Board should overrule *North Hills Office Services*, 346 NLRB 1099, 1103-04 (2006), on which the ALJ relied. Whenever an employer creates the context and atmosphere of coercion, the Board should find that additional statements, even if attributed to employees, is another form of unlawful surveillance. Member Liebman pointed this out in her dissent at footnote 24. Here, the record is replete with coercive conduct including other unlawful impressions of surveillance. Employees could not find these statements anything but coercive.

Alternatively, if the employer asserts without corroboration that he got the information from employees, the burden should be on the employer to identify the employees so that there is corroboration at the time the statement is made to the employees.

IV. MR. VAIVAO ENGAGED IN FURTHER UNLAWFUL MISCONDUCT ON MARCH 26.

The ALJ found that at a meeting on March 26, Vaivao, the already discredited and untruthful witness, did not create the impression of surveillance. Mr. Vaivao made it clear that the company knew who was out there "doing that." The reference was, of course, to Union activity. The next part of the phrase indicates that he knew it "because they come the next day to me." That statement makes it clear that the ALJ was wrong. Mr. Vaivao indicated that he knew who was engaged in Union activity because "they come the next day to me." That can't be credited that Union organizers or Union supporters would come to him the next day to confess

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

their Union activity. Plainly, Mr. Vaivao created the impression of surveillance. This makes the statement unlawful. Moreover, he did not limit what he knew. No matter what he was told, it couldn't have been either ambiguous or everything. Thus, his statement was designed to suggest he was engaged in surveillance of all activity.

Discredited, Mr. Vaivao additionally said, "I know who they are. I know exactly who they are." That statement again makes it clear that he was claiming that he knew all who were the organizers or employees supporting organizing. He certainly couldn't have learned that because everyone who came to him told him that they engaged in activity or identified everyone who was involved. The ALJ's finding should be reversed. See ALJD p. 11:4-12:15. See discussion above regarding *North Hills Office Services*.

V. MR. ENGDAHL'S STATEMENT CREATED THE IMPRESSION OF SURVEILLANCE.

The ALJ improperly found that the statement by Engdahl (and, as noted, one of his many unlawful statements) "that he understood who was behind the Union campaign…" was not unlawful. See ALJD p. 15:25-33. For the reasons indicated above, Mr. Engdahl, Mr. Vaivao and others made it plain that they knew who was behind the organizing, and it was clear that they couldn't have learned that simply because those involved in the organizing came to them and confessed. This statement unlawfully created the impression of surveillance. See discussion above about *North Hills Office Services.*

They illustrated that they knew who was organizing by firing one of the primary union supporters, Mr. Wallace.

VI. THE UNLAWFUL ACTIVITY OF MR. WHITE CAME IN THE CONTEXT OF OTHER UNLAWFUL ACTIVITY BY MANY OTHER MANAGERS.

The ALJ found that the statements by Mr. White, a supervisor, were not unlawful. See ALJD p. 18:6-19:23. First, whether or not Mr. White is a low level or a high level supervisor should be irrelevant in light of the torrent of unlawful activity by other supervisors. Second, it is plain that White did engage in surveillance and interrogation. Mr. White was plainly a pipeline to

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

shipping supervisor Meyers, and Mr. Phipps knew it. See ALJD p. 19, note 32. The conduct was unlawful.

VII. THE ALJ FAILED TO FIND THAT ADDITIONAL STATEMENTS CREATED THE IMPRESSION OF SURVEILLANCE.

The ALJ found that Mr. Engdahl's further statements in the meeting were unlawful but did not create the impression of surveillance. See ALJD p. 25:15-27:16.

For the reasons discussed above, those statements plainly made it clear to Mr. Lerma that there was surveillance ongoing. Here, Mr. Engdahl and Mr. Vaivao directly threatened Mr. Lerma about complaints from other employees without identifying those employees, given the other statements about how they learned about Union activity, this conduct was also unlawful.

Note once again, that the ALJ found that Mr. Engdahl and Mr. Vaivao were discredited (not telling the truth, dishonest, liars). We want to make it clear, however, that the Judge found that both Mr. Engdahl and Mr. Vaivao lied. See ALJD p.27: fn. 49. See discussion above about *North Hills Office Services.*

VIII. THE BOARD SHOULD OVERRULE *LUTHERAN HERITAGE VILLAGE-LIVONIA*.

The ALJ relied upon *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). That case should be overruled.

The Board should return to the rule established in *Lafayette Park Hotel*, 326 NLRB 824 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine for evaluating when employer-maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB 824 (1998). See also *Ark Las Vegas Rest. Corp*., 343 NLRB 1281, 1283 (2004) (any ambiguity in a rule that restricts concerted activity can be construed against the employer).

The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest in such activity. They may assert their right to "refrain from such activity." But those who choose to engage in such activity have their conduct chilled, if not prohibited. The Board's rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity. If an employer's action interferes with the Section 7 rights of one employee, the conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that conduct violates the Act only if many, and probably a majority, would have their rights violated. Such a rule should be discarded and thrown into the trash pile of discredited doctrines.

In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Lutheran Heritage Village-Livonia, 343 NLRB at 647.

This doctrine has created confusion and uncertainty in the application of rules. Moreover, it is an illogical statement. If the "rule could be interpreted that way [to prohibit Section 7 activity]," the rule should be unlawful. We are not suggesting that if that "reading is unreasonable," it should violate the Act. Only if the rule can be reasonably read to interfere with Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity, it should be unlawful. In fact, we believe that in most cases, if you ask the president of the company to explain their corporate rules, they can't explain how they would apply in most common circumstances where Section 7 rights are at issue. Shamrock offered nothing to explain the rules. This case incisively illustrates why *Lutheran Heritage Village-Livonia* should be overruled.

The Board's prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity against the employer. This has been the consistent application in many areas of law, including the Board's application of employer-created rules. After all, the employer has control over what

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

it says, and it can implement language that is not vague or ambiguous. This is inherently true of most employer rules, but quite clear in this case. Only the employer benefits from chilling and restricting Section 7 activity. Recently, the Board seemed to have made it plain in *Murphy Oil, supra*, where there is an ambiguity it would be construed against the Employer.

A worker is not at fault if the employer makes a statement that is ambiguous and could affect or chill Section 7 rights. The employer statement should be construed against the employer. Where there is any reasonable interpretation of the rule that could interfere with Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider discretion and more power. Such ambiguities necessarily coerce some employees.

This interpretation has become one by which the Board ignores the illegal yet reasonable interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has turned the law on its head; where there is a reasonable interpretation that the rule does not affect Section 7 rights, which only a few employees may apply, it makes no difference that most or many of the employees would apply a reasonable interpretation that the rule prohibits Section 7 activity.

Put in other words, the burden should be on the drafter and maintainer of a rule to prove that "no employee," not a single one, "would reasonably construe" the rule in a way to cover or limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7 activity, it would be unlawful.

This is further illustrated by the Board's recent decision in *Three D, LLC d/b/a Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the "term 'inappropriate' to be 'sufficiently imprecise' that employees would reasonably understand it to encompass 'discussion and interactions protected by Section 7.'" Slip Opinion p. 7. This is almost a formulation that where there is an ambiguity in a phrase or rule it should be construed against the drafter and enforcer of the rule, namely the employer. This contradicts, to some degree, the later statement that "many Board decisions [] have found a rule unlawful if employees would reasonably interpret it to prohibit protected activities." Slip Opinion p. 8. The word "would"

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

should be replaced with the word "could." This would shift the burden to the employer to clarify its rules to eliminate interference with Section 7 rights.

Recently, the Board has also made it clear that where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." *Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 at *19 (2014). The Board relied upon its prior decision in *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). Here, there are patent ambiguities in the policies. Thus, there is an ambiguity created that must be construed in light of *Murphy Oil* against the drafter of the rules, namely the employer. Under these circumstances, this is the perfect case in which to overrule *Lutheran Heritage Village-Livonia*. It is particularly an appropriate case in which to overrule that doctrine because the employer couldn't explain the rules. If the employer can't explain the rules, no employee could be expected to understand what position or conduct is prohibited or permitted.

The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of employer rules to be created from the employer perspective rather than from the view of a worker. Where the worker could read any reasonable interpretation into the rule that would prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that some workers might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact that at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus the rule would chill those activities. Where one employee understands the rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has been created.

We quote at length the dissent, and we will ask this Board to return to the view of the dissent:

> In *Lafayette Park Hotel*, *supra* at 825, the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825. While purporting to apply the

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

> Board's test in *Lafayette Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."
>
> Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity." On this point, of course, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could reasonably be read as lawful. This is not how the Board applies Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").
>
> The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules—to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's asserted pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees, especially in light of the other unlawful rules maintained by the Respondent. Rather, for reasons explained below, we find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).
>
> *Id.* at 650 (footnote omitted).

This reasoning was correct then and governs now.

The Board has already effectively overruled *Lutheran Heritage Village-Livonia*. It has in recent cases made it clear that "[w]here employees would reasonably read an ambiguous rule to restrict their Section 7 rights, the Board construes the ambiguity in the rule against the rule's promulgator. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). *Professional Janitorial Serv.*, 363 NLRB No. 35, n.8 (2015), *Murphy Oil USA, supra*, and *Caesars Entertainment*, 362 NLRB No. 190 (2015). *Lutheran Heritage Village-Livonia* cannot survive the logic. Once there is an ambiguity, some employees will construe the rule to

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

prohibit Section 7 activity. It is then inconsistent to hold that when the hypothetical employee who is deemed reasonable (meaning the NLRB) reads it one way, the Board ignores the other reasonable employees who read the rule to proscribe Section 7 activity. In effect, the Board has overruled *Lutheran Heritage Village-Livonia*, and it should now so state.

A. **SUMMARY**

In summary, *Lutheran Heritage Village-Livonia* should be expressly overruled. Alternatively the Board should concede that it has effectively done so.

IX. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE NLRA HAS TO BE APPLIED TO PROTECT THIS RELIGIOUS RIGHT.

To the extent that the NRLA would be interpreted to protect the employer's action and thus interfere with the religious right of employees to organize and engage in concerted activity, it must be interpreted to protect that religious right. Where there is one right guaranteed by the NLRA and that right is also a religious right, the RFRA teaches that the RFRA requires that the NLRA be interpreted consistent with the religious exercise.

The question then is whether, when workers get together to benefit themselves in the workplace, is this a religious exercise? That question is easily answered in the affirmative.

Religions are replete with references to the workplace. The religious exercise to help fellow workers is a fundamental tenet of every religion. Whether we use the phrase "brotherly love" or otherwise, every religion encourages workers to help each other to make themselves and the workplace better.[1] The central religious act of helping other workers is a core principle of Christianity and all religions.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care Act because it claimed that statute burdened

[1] This is just a religious version of the solidarity principle explained by the Board in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2004). This is the application of the most fundamental religious principle: the Golden Rule. See https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help regarding a workplace issue, the other employee should help the first. The employer directly contradicts the Golden Rule.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

its religious exercise. The Court found, against the government's arguments, that the Affordable Care imposed a substantial burden on religious activity and found that the government could not establish that it imposed the least restrictive means of establishing any governmental interest.

Here, the National Labor Relations Act governs the right of employees to engage in concerted activities. It is nothing more than workers getting together to help themselves and their families. Thus, there is nothing inconsistent with the application of Section 7, but any limitation on the application of Section 7 would be contrary to the religious views of those who want to help fellow workers.[2]

The Religious Freedom Restoration Act must be interpreted and applied in a way that protects the religious right of employees to engage in concerted activity.

Any other interpretation would burden those employees of other employers also. See David B. Schwartz, "The NLRA's Religious Exemption in a Post Hobby Lobby World: Current Status, Future Difficulties, and A Proposed Solution," 30 A.B.A. J. Lab. & Emp. L. 227 (2015) (explaining that the RFRA does apply to the NLRA).

What an employer cannot do, consistent with the National Labor Relations Act, the Norris-LaGuardia Act and the Religious Freedom Restoration Act, is entirely foreclose workers working together to make their workplace a better circumstance.

For these reasons, the Religious Freedom Restoration Act applies to this case.[3] The NLRA cannot be applied or interpreted in any way that it interferes with the religious right of employees to help other employees by prohibiting employees from jointly working together to

[2] Respondent may argue the RFRA cannot apply. The Board must consider the impact of all relevant federal statutes.

[3] The religious exemption principles that we derive from the RFRA are already in place and have been long recognized for those who have some religious objection to joining a supporting union. See 29 U.S.C. § 159. There are some religions that have the basic tenet that adherents should not join or support unions. Title 7 also recognizes that an accommodation is sometimes necessary. See *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (because employee's religious objection was to union itself, reasonable accommodation was required allowing him to make charitable donation equivalent to amount of union dues, instead of paying dues). Religious principles often govern and require an accommodation. *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S.Ct. 2028, 2015 WL 2464053 (2015). This case represents this principle: there are those who believe that it is a basic religious tenet to help fellow workers. Title VII thus requires an accommodation, workers who believe it is a religious exercise to help their fellow workers must be accommodated.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

improve the workplace and to help fellow workers with respect to wages, hours and working conditions.[4]

X. THE ALJ IMPROPERLY REJECTED THE CLAIM THAT LEAFLETS WERE REMOVED FROM THE BREAK ROOM.

The ALJ found that certain Union flyers were removed from a counter in the break room. See ALJD p.33:10-20. The break room is a non-work area. Employees are entitled to leave Union leaflets in the break room. There is no evidence that that counter "was maintained by the Company solely to display information on health and fitness…." Nor was any rule limiting items in the break room enforced. The removal of the leaflets violated the Act.

XI. THE SEPARATION AGREEMENT IS UNLAWFUL BECAUSE OF ITS CONFIDENTIALITY PROVISION.

It is undisputed that the Separation Agreement contains a confidentiality provision that "the terms of the Separation Agreement [may not be disclosed] to anyone…." See ALJD p. 44.

This prevents disclosure of anything about the separation agreement including the conditions of employment or reemployment. Although the Separation Agreement may not prohibit disclosure of the discharge, nonetheless it prohibits the disclosure of the terms under which the employee negotiates severance or leaving the company. It is thus unlawful.

XII. THE CONFIDENTIAL INFORMATION PROVISION OF THE HANDBOOK IS EXTREMELY BROAD.

The confidential information provision encompasses material that workers would need to disclose to a Union for organizing purposes. For example, they would need to disclose "organization structures" to determine the appropriate bargaining unit. They would have to disclose "marketing plans or efforts" if there was an issue about expansion or contraction of the workforce. They would have to disclose "training and service materials" because training affects working conditions. "Company Manuals and Policies" reasonably includes all company Manuals and Policies including the handbook, which relates to wages, hours and working conditions. "Business Plans" would have to be disclosed if there is going to be some impact upon the working conditions of employees, such as laying off or hiring employees. "Compensation

[4] The Board must address the application of the RFRA because it contains a statutory fee requirement. Charging Party is entitled to its fees if it prevails on this ground.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

schedules" relate to wages, hours and workers directly, but it also relates to other business information that is prohibited from disclosure.

In this regard, we want to make it plain that the Board must face the issue of whether the prohibition against disclosing some business information is unlawful. Unions plainly need this to determine the appropriate bargaining unit. Unions need this information if they are going to adequately represent employees with respect to their wages, hours and working conditions. Many of the confidential information provisions would require disclosure of that information to the Union if the Union requested it for bargaining or representational purposes. The maintenance of this provision makes it plain to employees that the Union could never obtain any information necessary for effective and adequate representation.

Workers need it if they are going to engage in lawful boycotts.

The provisions are unlawful.

In summary, although the ALJ found that the language about associates and compensation title is unlawful, the rest of it must be found also to be unlawful.

XIII. THE MEDIA INFORMATION REQUEST PROVISION IS UNLAWFUL.

The Media information provision applies to "overall Company information or to respond to any public events or issue for which we might receive press calls or inquiries." The ALJ unreasonably concluded that this was limited to information provided by a third party. See ALJD p. 48:24-25. It expressly prohibits disclosure of "overall Company information." Even if the information is provided by a third party, the employee would be entitled to respond. The context does not override the clear language that media inquiries have to be dealt with by someone other than the employees.

XIV. THE ELECTRONIC AND TELEPHONIC COMMUNICATIONS PROVISION IS UNLAWFUL.

The ALJ found that the "Electronic and Telephonic Communications" policy was not unlawful because he believed that it did not apply to the warehouse employees. First, the ALJ improperly failed to recognize that this language is applicable to all employees of the employer and not just the warehouse employees. Thus, it is unlawful.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Second, the provision is unlawful to the extent that it applies to other employees of the employer. Thus, it chills the rights of employees in the warehouse even if they don't have access to the electronic media because they know the employer has applied an unlawful rule to other employees.

The electronic media rule is invalid because it means that employees in the warehouse cannot join with other employees and assist them in their protected concerted activity because their efforts are limited by the unlawful provision. The provision is plainly unlawful under *Purple Communications*, 361 NLRB No. 126 (2014).

XV. THE MONITORING USE PROVISION IS UNLAWFUL.

For reasons discussed above, the monitoring use provision is unlawful. See ALJD p. 49:12-50:6.

XVI. THE INSTANT MESSAGING LANGUAGE IS UNLAWFUL.

For reasons discussed above, the instant messaging language is unlawful. See ALJD p. 50:9-25.

XVII. THE WORLD WIDE WEB LANGUAGE IS UNLAWFUL.

For the reasons discussed above, the World Wide Web language at ALJD p. 50:26-51:25 is unlawful.

XVIII. THE GUIDELINE TO PROHIBITED ACTIVITIES IS UNLAWFUL.

The ALJ held that the guideline to prohibited activities provision is not lawful because it applied to company computers and equipment. See ALJD p.54:34-15:16. For the reasons pointed out above, the ALJ was incorrect.

XIX. THE NO SOLICITATION DISTRIBUTION RULE IS INVALID.

The no solicitation distribution rule is invalid because solicitation is inherently ambiguous and unclear.

Under current Board law, a general nondiscriminatory rule limiting employees' communications that are solicitations to non-work time is valid on its face and may be applied to email communications as to other communications. This follows from the fact that "[w]orking time is for work," so that "a rule prohibiting union solicitation during working hours . . . must be

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Republic Aviation v. NLRB*, 324 U.S.793, 803 n.10 (1945). By the same token, because time outside working hours . . . is an employee's time to use as he wishes without unreasonable restraint, . . . a rule prohibiting union solicitation by an employee outside of working hours, although on company property[,] . . . must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *Republic Aviation*, 324 U.S. at 803–04 n.10. Thus, to justify restrictions on employee email communications concerning union or other concerted, protected matters during non-work time, the employer must show "special circumstances" that "make the rule necessary."

On the other hand, it is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act. *Mcpc, Inc*., 360 NLRB No. 39 (2014); *Flex Frac Logistics*, 358 NLRB No. 127 at * 1-2 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Costco Wholesale*, 358 NLRB No. 106 at p. 2-3; (2012) *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694 (1997). See also *Scientific-Atlanta, Inc*., 278 NLRB 622, 624-625 (1966) (wages are a "vital term and condition of employment," "probably the most critical element in employment" and "the grist on which concerted activity feeds").

It is, however, no longer possible to distinguish between solicitation and communication. The Board has historically attempted to draw a distinction between solicitation and mere talking. *Conagra Foods, Inc.*, 361 NLRB No. 113 (2014), *enforcement denied in part, ConAgra Foods, Inc. v. NLRB*, 2016 WL 682979 (8th Cir. Feb. 19, 2016). See also *Fremont Med. Ctr*., 357 NLRB No. 158 n. 9 (2011). In *W. W. Grainger, Inc*., 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118 (7th Cir. 1978), the Board noted, "It should be clear that 'solicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." See *Powellton Coal Co*., 354 NLRB 419 (2009), incorporated by reference in 355 NLRB 407 (2010) (employer unlawfully prohibited employees from engaging in conversations about the union). "An employer may not restrict union related conversations while permitting conversations

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

relating to other topics." *Rockline Indus*., 341 NLRB 287, 293 (2004); *Jensen Enter*., 339 NLRB 877, 878 (2003). Thus, an employer cannot turn a valid no-solicitation rule into a no-talking rule. *Starbucks Corp*., 354 NLRB 876, 891-93 (2009); *Emergency One, Inc*., 306 NLRB 800 (1992) (respondent unlawfully restricted conversations about the union during work time while permitting other conversations including those about non-work matters); *ITT Indus.*, 331 NLRB 4 (2000) (respondent's instruction not to engage in any discussion of the union with any employee was unlawful where employees were, notwithstanding rule in employee handbook prohibiting all solicitations during working time, allowed to engage in discussions and solicitation on the production floor). In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enforced in relevant part*, 400 F.3d 1093 (8th Cir. 2005), the Board found that the wearing of union insignia was not solicitation and would not justify the application of a no solicitation rule. The Eighth Circuit found that the employee solicited when he requested a signature on an authorization card, but did not engage in solicitation when he: (1) entered a Walmart store while off-duty wearing a t-shirt that read "Union Teamsters" on the front and "Sign a card… Ask me how!" on the back and (2) had conversations, while on-duty, with Walmart Associates about attending a union meeting. *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097-1098 (8th Cir. 2005). The Board's recent Decision in *Conagra Foods, Inc., supra*, illustrates, however, that this distinction is not viable.

For proof of our argument, we turn to the dictionary. The Supreme Court and lower courts routinely turn to the dictionary as an authoritative source. Merriam-Webster's definition of "solicit" is in part as follows:

> Full Definition of SOLICIT
>
> *transitive verb*
>
> 1 a : to make petition to : entreat
>
> b : to approach with a request or plea <*solicited* Congress for funding>
>
> 2 : to urge (as one's cause) strongly
>
> See http://www.merriam-webster.com/dictionary/soliciting.

The Oxford English Dictionary has the following definition of solicitation:

> 1 Ask for or try to obtain (something) from someone:

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

'he called a meeting to solicit their views'

1.1 Ask (someone) for something:

'historians and critics are solicited for opinions by the auction houses'

See http://www.oxforddictionaries.com/us/definition/american_english/solicit?q=solicitation#solicit__10.

Neither of these definitions is limited to asking someone to pay money or sign something contemporaneously. Asking for help or support is clearly a form of solicitation and clearly protected. Asking other workers to walk out or to support some other action would be solicitation.

Focusing on the definition "to urge (as one's cause) strongly," the term does not constitute solicitation within the Board's traditional definition of asking for money or asking someone to sign an authorization card contemporaneously. Soliciting can, according to this definition (and many dictionary definitions), constitute just communication. If many dictionaries define solicitation in this broader fashion, any reasonable employee could read the dictionary and come to the same conclusion.

Conagra Foods, Inc., supra, again confirms that solicitation "'usually means asking someone to join the union by signing his name to an authorization card' at that time." *Id*. at p. 2. These cases, however, make it clear that the word "solicitation" is capable of many meanings, some of which are contradictory. Indeed, the dispute in *Conagra Foods* demonstrates that there remains no clear understanding of what constitutes "solicitation." Management contends it has a broader meaning. If the Board and courts are in disagreement, there is no reason to believe that a "reasonable employee" would read it more narrowly or more broadly. Particularly if management claims it has a broader meaning, no "reasonable" or any employee can figure out what it means. Moreover if two judges on the Eighth Circuit have their own view and a third judge a different view there can be no clear interpretation of what the term means. It is inherently ambiguous if no one can agree what is solicitation.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

If an employer's policy explained that solicitation was the immediate request for money or joining, the uncertainty would be eliminated. Member Miscimarra's dissent in *Conagra*, *supra*, proves our point. He argues the Board's decision creates uncertainty as to what is solicitation. If he is correct, then any no-solicitation policy is void.

Since dictionaries define solicitation to include much broader conduct than falls within the traditional labor law definition, the use of the word "solicit" without further limitation, is overbroad. The ALJ must directly face this issue.

Applying *Lutheran Heritage Village-Livonia*, employees will reasonably conclude, as the Merriam-Webster and many dictionaries have, that solicitation encompasses activity that is protected and permissible during work time. If the Board and the Courts and employers cannot adequately identify what is the difference between solicitation and communication, the word is overbroad. This further illustrates why *Lutheran Heritage Village-Livonia* should be overruled.

The Eighth Circuit's decision in *ConAgra* reinforces this. Here, the Eight Circuit disagrees only in part with the Board's understanding of what solicitation involves. This proves that not only Judges on the Eight Circuit of whom there was one dissent and the Board can't figure out what solicitation is. If that is correct, the employees can't be expected to figure out what it is. The term is inherently unclear.

For these reasons, the no solicitation language should be held to be unlawful.

Additionally, soliciting is work related. It is work related because employees are seeking to better their working conditions. Thus, a prohibition against such activity "during working time" because it is not work related is inherently contradictory and overbroad. The ALJ also ignored the following phrase:

> Associates may not solicit other associates under any circumstances for any non-company related activities.

Workers have the right to solicit other employees for political activity related to working conditions. *Eastex, Inc. v NLRB*, 437 U.S. 556 (1978). They have the right to solicit employees to support workers at other facilities. The language is overbroad and illegal.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

The language that prohibits distribution "in public areas" is overbroad. See ALJD p. 57:25. Public areas of a warehouse includes bathrooms, parking areas and in front of the warehouse. The language is overbroad.

The ALJ's conclusions with respect to the no solicitation rule should be reversed. See ALJD p. 57:9-58:25.

XX. THE CELL PHONE USE POLICY IS UNLAWFUL.

The cellphone policy was implemented and promulgated during the course of all of this protected concerted activity. It was plainly retaliatory.

Additionally, it prohibits use of cell phones "within the warehouse." Employees have the right to use cell phones or ear phones during non-work time when they are relaxing. They have the right to listen to Union songs sung by Pete Seeger or Woody Guthrie. They have the right to listen to downloads about the way the rich are exploiting the working class. The language of the policy is overbroad.

XXI. REMEDY

The remedy is inadequate

The remedy should include the following:

The employer should be required to post permanently the Board's ill-fated employee rights notice. See https://www.nlrb.gov/poster. The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of sixty days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. See Cal. Lab. Code § 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behavioralists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions…." The employer should not be present. The Union should be notified and allowed to be present. This should be on work time and paid. If the employees are working piece rate, the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The reading should be multiple times. Additionally, because multiple managers were involved in the unlawful conduct, each of them should be required to read the notice to the employees. Just letting one manager do it, escapes the responsibility of the other managers who were involved in the unlawful conduct.

The managers or supervisors who engaged in illegal activity and who were discredited (lied), should be fired.

The attorneys for the company should be required to be present when the reading occurs. They have vigorously and dishonestly argued that the employer did not violate the Act. They have conspired with the company to support these allegations. They need to be present so that the workers can understand that the lawyers are in part responsible for this unlawful conduct ad that they have been part of the remedy. They should be humiliated.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We have made numerous illegal threats, we have illegally fired a worker, etc. We deeply apologize for this misconduct. The supervisors and other employees who have violated the law have been fired.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice whether by email, on the wall or at home on their own time is to punish them for their employer's misdeeds.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

The terminated employee should be allowed to return to work with a union marching band playing songs.

The Board has awarded litigation expenses where, as here, a party raises frivolous defenses or its conduct of the litigation manifests bad faith. See *HTH Corp*., 361 NLRB No. 65, slip op. at 3-4 (Oct. 24, 2014) (awarding litigation expenses in the face of pervasive, repeated, and unremedied violations); *Camelot Terrace*, 357 NLRB No. 161, slip op. at 4 (Dec. 30, 2011) (awarding litigation expenses for, among other things, for relying on "transparently nonmeritorious defenses"); *Teamsters Local 122*, 334 NLRB 1190, 1193 (2001) (awarding

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

litigation expenses for conducting wasteful cross-examination and failure to mount any real defense); see also *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998) (awarding litigation expenses because party exhibit bad faith conduct in conduct of litigation), *enforced*, 192 F.3d 133 (D.C. Cir. 1999).

The Board should require Shamrock at its own expense to offer supervisor training on respecting employee rights.

XXII. CONCLUSION

For the reasons stated above, the Cross-Exceptions should be granted. Shamrock's extensive terrorism should be subject to a full remedy. The Board should return to its early days when it correctly identified such conduct as terroristic activities. See headnotes to *Alabama Mills, Inc.*, 2 NLRB 20 (1936); *Jones & Laughlin Steel Corp.*, 1 NLRB 503 (1936); and *Brown Shoe Co., Inc.* 1 NLRB 803 (1936).

Dated: April 7, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ DAVID A. ROSENFELD
By: DAVID A. ROSENFELD
ALAN CROWLEY
Attorneys for Charging Party,
BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC

138531/855508

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 7, 2016, I served the following documents in the manner described below:

CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

(BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

X (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses set forth below.

On the following parties in this action:

Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Via E-Filing

Nancy Inesta
Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025-0509

Via Email: ninesta@bakerlaw.com

Jay P. Krupin
Todd A. Dawson
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5304

Via Email: jkrupin@bakerlaw.com
tdawson@bakerlaw.com

Elise F. Oviedo
Counsel for the General Counsel
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101

Via Email: Elise.oviedo@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 7, 2016, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001